REPUBLIC oF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 190 OF 2011

BEATRICE WANJIKU...1ST PETITIONER

STANLEY KARIUKI...2ND PETITIONER

AND

HON. ATTORNEY GENERAL...1ST RESPONDENT

COMMISSIONER OF PRISONS..2ND RESPONDENT

AND

JOSEPH KAGURI MUNA...1ST INTERESTED PARTY

ROBINSON MUKIGI..2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners claim is straight forward. In their re-amended petition dated 14th November 2012, they state as follows;

(5) Kenya has ratified the United Nations International Covenant Civil and Political Rights which at Article 11 disallows civil jail for matters whose cause of action arises from contractual obligations.

(6) Article 2(5) and 2(6) of the Constitution incorporates into Kenyan Law the above mentioned convention and thus civil jail for debtors is unlawful.

(7) Further, imprisonment of a debtor violates their rights as captured in the bill of rights including the right to liberty and movement.

(8) The 2nd respondent has continued to receive and detain debtors in various prisons in the country.

2. The petitioners' case is that they bring this petition in the public interest and on behalf of those debtors found in their circumstances. The petitioners seek a declaration that civil jail for debtors, violates, infringes or threatens rights and fundamental freedoms in the Constitution and human rights conventions. The petitioners have decrees against them in ***Muranga PMCC No. 285 of 2009, Joseph Kaguri Muna v Beatrice W. Gacathi*** and ***Kangema SRMCC No. 88 of 2011 Robinson Mukingi v Stanley Kariuki***. They have been subjected to the process provided for committal to civil jail under the provisions of the ***Civil Procedure Act*** **(Cap 21 of the Laws of Kenya)** and the ***Civil Procedure Rules***.

Petitioners' Case

3. The petitioners' claim is founded on the fact that Kenya has ratified the ***United Nations International Covenant on Civil and Political Rights*** ("**ICCPR**") which at **Article 11** disallows civil jail for matters whose cause of action arises from contractual obligations. By dint of **Article 2(5)** and **(6)**, the ICCPR forms part of the laws of Kenya. The petitioners contend that **Article 2** creates a hierarchy of laws with the international conventions being superior to national legislation therefore the provisions of the ***Civil Procedure Act*** contravene the ICCPR.

4. The petitioners complain that the imprisonment of debtors violates their fundamental rights and freedoms protected in the Bill of Rights including the right to liberty and movement. According to them, the 2nd respondent, the Commissioner of Prisons, has continued to receive and detain debtors in various prisons across the country.

5. As regards their specific cases, the petitioners' aver that the provisions of **Order 22 rules 34** and **35** of the ***Civil Procedure Rules*** which place on the judgment holder the burden of proving that a judgment debtor has money and is merely refusing to pay was not adhered to when they were committed to jail and their detention is therefore unfair, illegal and contrary to law and accordingly they urge this court to intervene by upholding their rights.

Respondents' Case

6. The Attorney General filed grounds of opposition dated the 10th January 2012 and written submissions dated 10th July 2012 in which it is contended that there has been no breach of the petitioners rights and fundamental freedoms as alleged or at all.

7. The Attorney General argues that the fundamental rights and freedoms protected in the Bill of Rights are not absolute save for those protected under **Article 25** thereof and that these are subject to the need to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and fundamental freedoms of others. The Attorney General submitted that the court is required to balance the rights of the petitioner guaranteed under the Bill of Rights and the rights of the interested parties to recover their debts. This balance, it is submitted, is required by **Article 24**.

8. Ms Barasa, counsel for the Attorney General, submitted that the procedure provided under the ***Civil Procedure Act*** and the ***Civil Procedure Rules*** ("the Rules") particularly that relating to the *Notice to show cause* against detention in prison is discretionary power granted to the judicial officer in the execution of a money decree and that if the petitioners are aggrieved by the decision of the court to send them to civil jail, they ought to have challenged the exercise of discretion as well as the judgment in an appeal.

9. The Attorney General's position is that **Article 11** of the ***ICCPR*** which provides that, *"No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation,"* implies that a judgment

debtor can be committed to civil jail if there are compelling reasons, and that it is the petitioners' obligation to prove that reasons do not exist for such committal.

Interested Party's Case

10. Only the 1st interested party, Joseph Migwi Muna, appeared in these proceedings and opposed the petitition. He is one of the judgment creditors and his case is that **section 40** of the ***Civil Procedure Act*** is part of our law and the statute has not been repealed. Furthermore, the ICCPR is neither superior to the Constitution nor to legislation.

11. Counsel for the interested party, Mr Okindo, termed civil jail as a 'very useful device' which ought not be outlawed as creditors have fundamental rights to recover their money and to be protected from debtors who borrow with no intention of paying up.

12. The interested party's position is that at all material times, due process was followed, and the 1st petitioner was given the opportunity to propose payment by instalments which she did but declined to honour the agreement to pay the instalments as they fell due.

Issues for determination

13. The pleadings disclose the following issues for determination;

a) Whether there is a breach of the petitioners' rights under **Article 11** of the ICCPR. In determining this question I have to consider the applicability of international law, treaties and conventions as part of Kenyan law as provided in **Article 2(5)** and **2(6)** of the Constitution.

b) Whether there has been a breach of the petitioners' fundamental rights and freedoms protected under the Bill of Rights.

Application of Article 11 of the ICCPR

14. In support of its case, the petitioners relied on the decision of Justice Koome in ***Re Zipporah Wambui Mathara*** **Milimani BC Cause 19 of 2010 (Unreported)**. The applicant debtor applied for release from civil jail on the basis that a receiving order had been made. After considering the provisions of the ***Bankruptcy Act***, the learned judge stated as follows, *"The provisions of the Constitution of Kenya 2010 was also invoked and this ruling would not be complete without a commentary on those submissions. Principally I agree with counsel for the debtor that by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan Law. This covenant makes provisions for the promotion and protection of human rights and recognises that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed. For the above additional reasons I will allow the application, the costs of this application will however be awarded to the respondent."*

15. Justice Koome seemed to suggest that the provisions of the ***Civil Procedure Act*** and ***Rules*** were subject to ICCPR and that they could be invalidated on that basis that they were inconsistent with its provisions.

16. The same issue was once again raised in the case of ***Diamond Trust Kenya Ltd v Daniel Mwema Mulwa Milimani*** **HCCC No. 70 of 2002 (Unreported)** where the court was required to decide whether a warrant of arrest issued for the non-payment of a debt violated the fundamental rights and freedoms of the applicant. In his ruling, Justice Njagi addressed the issue of hierarchy of laws. He observed, *"We have in this country a three tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws as subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile. The Civil Procedure Act is an Act of parliament which provides for procedure in Civil Courts. Section 40 thereof makes provision for the arrest and detention of judgment debtors……. To the extent that this Section provides for the arrest and detention of a judgment-debtor, it is clearly in conflict with Article 11 of the International Convention on Civil and Political Rights. The two are contradictory. This raises several issues. Can the two provisions co-exist" If so, how can they operate side by side" And if any cannot co-exist, which of them should take precedence over the other" <u>In my view, Article 11 of the International Convention on Civil and Political Rights cannot rank pari passu with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute Book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other. That conflict calls for re-consideration of the probative value of section 40 in the light of the new Constitutional dispensation.</u> Only after a revaluation can it be determined whether to retain section 40 in the Civil Procedure Act, or to do away with it altogether in favour of Article 40 should be repealed as being unconstitutional. In the spirit of the new Constitutional order, it is more likely than not that Kenyans would prefer a system in which there is no threat of civil jails. Until a decision is taken at a proper forum, section 40 of the Civil Procedure Act will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum. In my view, where a section of the law takes away a right which is conferred by another section, the former section should itself be taken away."*[Emphasis Mine]. Ultimately, the learned judge declined to express a position on the matter. It is this inquiry that now must be undertaken in this case.

17. Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular **Article 2(5)** and **2(6)** gave new colour to the relationship between international law and international instruments and national law. **Article 2(5)** provides, ***"The general rules of international law shall form part of the law of Kenya"*** and **Article 2(6)** provides that ***"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."***

18. While the Constitution is clear that international law is applicable in Kenya, it is the relationship between international instruments that Kenya has ratified and legislation that lacks clarity hence the dilemma expressed by Justice Njagi in ***Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*** **(Supra).**

19. The petitioners argue that international instruments that Kenya has ratified are superior to Acts of Parliament. Counsel submitted that the term ***'under this Constitution'*** employed in the **Article 2(6)** means that the drafters of the Constitution must have intended for the international conventions to fall *'immediately below'* the Constitution in terms of hierarchy. Furthermore, the petitioner's contended, the failure to include statutes and common law in the hierarchy of laws under **Article 2** suggests that the framers intended to confer this status on treaties and conventions and the inclusion of international

instruments implies that they have greater force of law than other sources of law which are not included in **Article 2**.

20. I take the position that the use of the phrase **"under this Constitution"** as used in the **Article 2(6)** means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of **Article 94**. **Article 1** places a premium on the sovereignity of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby underminining the doctrine of separation of powers which is part of our Constitutional set up.

21. I think a purposive interpretation and application of international law must be adopted when considering the effect of **Article 2(5)** and **2(6)**. These provisions should not be taken as creating a hierarchy of laws akin to that set out in the provisions **section 3** of the ***Judicature Act*** **(Chapter 8 of the Laws of Kenya)**. **Article 2(5)** and **(6)** must be seen in the light of the historical application of international law in Kenya where there was a reluctance by the courts to rely on international instruments even those Kenya had ratified in order to enrich and enhance the enjoyment of human rights. I would also draw on the authority of **Article 19(3)** which is part of the Bill of Rights that recognizes other rights other than those protected by the Bill of Rights provided they are not inconsistent with the Constitution. These rights would be founded not only on specific statutes but also international treaties and conventions.

22. Modern Constitutions contain freestanding provisions that regulate the relationship between international law, customs and treaties, and national law. For example, the Constitution of South Africa has specific provisions separate from the supremacy clause, **Articles 231, 231** and **233,** which deal with theapplication of international law. In our case, the international law provisions are part of the supremacy clause. **Article 2(5)** and **(6)** regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law. Second, the application of international law in Kenya is clarified to the extent that it not left in doubt that international law is applicable in Kenya.

23. The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under **Article 94** and when dealing with matters of fundamental rights and freedoms, the duty to the court, when applying a provision of the Bill of Rights, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom as provided in **Article 20(3)(b)**. The issue then, is not necessarily one of hierarchy but of application of treaties and conventions.

24. The **Civil Procedure Act** and the ***Rules*** provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. **Article 11** of the Convention states that, *"No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."*[Emphasis mine] I read the *merely* as used above to mean that *one cannot be imprisoned for the* ***sole*** *reason of inability to fulfill a contractual obligation.* It means that additional reasons other than *inability* to pay should exist for one to be imprisoned. **Article 11** recognises that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there is no inconsistency between **Article 11** of the

Convention and the general tenor of the committal regime under ***Civil Procedure Act*** and the ***Rules***, the provisions of **Article 11** of the Convention are at best an interpretative aid.

Whether Civil Procedure Act is unconstitutional

25. Sachs J., stated in ***Farieda Coetzee v Republic of South Africa*** **Case No. CCT 19/94** at paragraph 44 that*, " there can be no doubt that committing someone to prison involves a severe curtailment of that person\'s freedom and personal security. Indeed, the very purpose of committal is to limit the freedom of the person concerned. Given the manifest and substantial invasion of personal freedom thus involved, the real issue that we have to decide is whether such infringement can be justified in terms of the general limitations on rights permitted by Section 33 of the Constitution. This is the nub of the problem before us."*

26. Whether committal to civil jail for a debt is unconstitutional has been the subject of several decisions in Kenya. In the case of **Zipporah Wambui Mathara (Supra),** Justice Koome expressed the view that*, "There are several methods of enforcing a civil debt such as attachment of property. The respondent claims that the debtor has money in the bank, that money can also be garnished. An order or imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the International Covenant on civil and political rights that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development."*

27. In ***R.P.M v P.K.M***, **Nairobi Divorce Cause No. 154 of 2008 (Unreported)** Justice G.B.M. Kariuki, J. expressed himself forcefully over the matter as follows, *"However, I hold the view that no one should be sent to Civil Jail for inability to pay a debt. It would be morally wrong to do so. It would arguably also amount to discrimination against the have-nots. And it would make no sense to send to Civil Jail a person who is unable to pay. That would be malicious. In any case, it would amount to throwing away good money after bad for the creditor. Civil Jail is for those who refuse to part with their money to pay debts. The Respondent in this case is not unable to pay. He is not a man of straw. The thesis by the Honourable Justice Nambuye in her Ruling delivered on 24th May 2010 clearly shows that the Respondent possesses resources from which he can, if he so wishes, pay the money he owes by way of maintenance."* The judge further stated as follows, *"Civil Jail is a measure taken as a matter of final resort. In this case, the Petitioner has resorted to Civil Jail ostensibly because she is unable to identify any property belonging to the Respondent which she can attach. She cannot be blamed. It is regrettable that the Respondent has failed to shoulder his obligation as a husband and a father and has allowed the matter to drift to this level."*

28. It is now well established that where a petitioner seeks relief from the court for breach of fundamental rights and freedoms under **Article 22**, he or she must set out with precision the rights violated and the manner in which the rights have been violated in relation to him. (See ***Anarita K Njeru v R (No. 1) (1979) KLR 154*** *and* ***Cyprian Kubai v Stanley Kanyonga Mwenda Nairobi HC Misc. No. 612 of 2002 (Unreported.)*** The petitioner's burden is somewhat lightened by the sentiments expressed by our courts which I have alluded to.

29. But it would be important to remind ourselves why committal and imprisonment constitutes a violation of fundamental rights and freedoms guaranteed by our Constitution. The right to inherent dignity of the person protected under **Article 28** is a proclamation of our humanity. Arbitrary arrest and imprisonment degrades the human spirit, affects families and relationships. Arbitrary arrest and committal also infringes the right to security of the person protected under **Article 29**, the right to a fair trial protected under **Article 50(1)** and the right to movement under **Article 39**. A consideration of all

these rights points to the a fact that arrest and committal of a judgment-debtor constitutes a violation of the collectivity of these rights.

30. The issue that calls for determination is whether such violation of rights through the committal and imprisonment of a judgment debtor is justifiable in an open and democratic society on the basis of the limitation to fundamental rights provided under **Article 24** which provides as follows;

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

31. The application of **Article 24** involves the weighing of competing values and conducting an assessment based on proportionality but always bearing in mind that the purpose of the Constitution and particularly the Bill of Rights is to preserve the dignity of individual and to promote social justice and the realization of the potential of all human beings. **Article 24** is not a checklist and the weighing of these considerations is not to be approached mechanically. La Forest J. of the Canadian Supreme Court in ***United States of America v Cotroni*** **42 CRR 101 (1989)** at 117 observed that, *"In the performance of the balancing task … a mechanistic approach must be avoided. While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must sensitively be weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature."*

32. The inquiry whether the process of arrest and committal to civil jail is reasonable and justifiable in an open and democratic society is not novel. The Constitutional Court of South Africa had the opportunity to pronounce on this issue in the case of ***Farieda Coetzee v Republic of South Africa*** **(Supra).** The court was moved to rule on the constitutional validity of the provisions of the relevant legislation relating to the imprisonment of defaulting judgment debtors. After considering the provisions the court concluded that the provisions were overbroad and did not make a distinction between those who willfully refuse to settle their debts even though they have the means and those who cannot pay because they do not have the means but who fail to prove their inability to pay. As Krieglar J. put it, *"[T]he statute sweeps up those who cannot pay with those who can but simply will not."* The Court held that the provision on imprisonment for civil debt under the statute before them was unconstitutional, not because such imprisonment was inherently unconstitutional under all circumstances, but because the provision under consideration by them was unreasonable on account of being overly broad.

33. The determination of the validity of the provisions concerning the imprisonment of judgment debtors calls for an examination of **sections 38** and **40** of the ***Civil Procedure Act*. Section 38** grants

the court powers to enforce execution. It provides;

38. Subject to such conditions and limitations as may be prescribed, the court may on the application of the decree holder, order execution of the decree

(a) – (c)

(d) by arrest and detention in prison of any person.

(e)-(f)

PROVIDED that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment–debtor an opportunity to showing cause why he should not be committed to prison, the court for reasons to be recorded in writing is satisfied –

(a) That the judgment debtor with the object or effect of obstructing or delaying the execution of the decree

(i) Is likely to abscond or leave the locals limits of the jurisdiction of the court; or

(ii) Has after the institution of the suit in which the decree was passed dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) That the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempted from attachment in execution of the decree; or

(c) That the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

34. **Section 40** of the ***Civil Procedure Act*** provides as follows;

40. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court, and his detention may be in any prison of the district in which the court ordering the detention is situate, or, if such prison does not afford suitable accommodation, in any other place which the Minister may appoint for the detention of persons ordered by the courts of such district to be detained:

Provided that –

(i) for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise;

(ii) no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto; but when the officer authorized to make the arrest has duly gained access to any dwelling-house he

may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;

(iii) if the room is in the actual occupancy of a woman who is not the judgment-debtor, and who according to the custom of her community does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest;

(iv) where the decree in execution of which a judgment-debtor is arrested is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Minister may, by notice in the Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as he may direct.

35. The manner of depriving a person of liberty is prescribed by **section 38** of the ***Civil Procedure Act*** as set out above. In cases where the decree is for payment of money, the person or judgment debtor will not be committed to detention in prison unless he is first given an opportunity of showing cause why he should not be committed to prison. The procedure for giving the judgment-debtor an opportunity to show cause why he should not be committed to detention in prison is prescribed by **Order 22 rules 7, 31, 32** and **35** of the ***Civil Procedure Rules*** which provide;

Rule 7(1)

7. (1) Where a decree is for the payment of money the court may on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.

Rule 31

31. (1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Rule 32

32. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

Rule 34

34. (1) Where a judgment-debtor appears before the court in obedience issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.

(2) Before making an order for the committal of the judgment- debtor to prison, the court, for reasons to be recorded in writing, shall be satisfied —

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

(3) While any of the matters mentioned in subrule (2) are being considered, the court may, in its discretion, order the judgment-debtor to be detained in prison, or leave him in the custody of an officer of the court, or release him on his furnishing security, to the satisfaction of the court, for his appearance when required by the court.

(4) A judgment-debtor released under this rule may be rearrested.

(5) Where the court does not make an order under subrule (1), it shall cause the judgment-debtor to be arrested, if he has not already been arrested, and, subject to the provisions of this Act, commit him to prison.

36. Where the judgment-debtor does not make an appearance in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor under **Rule 32(2).** The warrant is issued to enforce court attendance of a judgment-debtor who has been served with the notice. Under **Rule 35** aforesaid, where a judgment-debtor appears before the court in obedience to a notice issued under **Rule 32**, or is brought before the Court after being arrested in execution of a decree for the payment of money, he may be examined on his means or otherwise to satisfy the amount of the decree and the court may on terms as it may think fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be. The application is disallowed if the judgment-debtor is unable to pay the judgment debt as a result of poverty or other sufficient cause.

37. Where the Court however finds that the judgment debtor should be committed to detention in

prison it must satisfy itself that the conditions for committal to prison in respect of a money decree are strictly fulfilled, and the court must take a record in writing of its findings before such committal. These conditions are set out in the proviso to **section 38** of the ***Civil Procedure Act***, and are repeated in **Order 22 rule 34 (2).**

38. **Section 40** of the ***Civil Procedure Act*** is not to be read in isolation. It is a consequence of **section 38.** It regulates the manner in which arrest and committal is effected in accordance with **section 38** and **Order 22** of the ***Rules***. Thus the reference to *"a judgment-debtor may be arrested"* does not refer to the power of the cout or judgment-creditor to effect arrest at anytime but rather that the power of arrest is consequent upon the court following the procedure prescribed by **section 38** and the rules promulgated for that purpose.

39. In the case of ***Mohammed & Muigai Advocates v Samuel Kamau Macharia & Another*** **Milimani HCCC 1158 of 2002 (Unreported),** the constitutionality of the process of arrest and committal for a judgment debt was challenged. The judgment debtor argued that a Notice to Show Cause was contrary to **section 72** of the former Constitution prohibiting imprisonment or subjecting a person to inhuman and degrading treatment merely on the basis of inability to fulfil a contractual obligation and that ***Order 22 rules 7*** and ***32*** permitted deprivation of liberty before due process of law had been observed was contrary to **section 77(a)** of the former Constitution.

40. Justice Emukule held that ***<u>Notice to Show Cause why Execution should not issue</u>*** is a condition precedent to some form of inquiry prescribed by **section 38** and **Order 22** as to what property or means of satisfying the decree the judgment debtor may have. The court concluded that the procedure prescribed if followed could not violate the provisions of a fair hearing.

41. The provisions of the ***Civil Procedure Act*** and the ***Rules*** have been the subject of court decisions which have elucidated the manner in which committal and arrest for a judgment-debt is to be effected. In ***National Bank Limited v Linus Kuria Ndung'u*** **Milimani HCCC No. 81 of 1998(Unreported)**, Justice Lesiit considered the application of **Order 22 rule 35**. The learned judge observed that, *"The rule is very clear concerning the issues that the court should consider and be satisfied before making the order for committal to civil jail. First to be adhered to is the requirement that the reason for which informed the Deputy Registrar to decide the way he did must be recorded in writing …… the Deputy Registrar must be satisfied;*

(i) That the judgment debtor has, since the date of the decree, the means to pay the amount of the decree and some substantial part thereof;

(ii) And refuses or neglects or neglected to pay the same ….."

42. The court also considered the issue of the burden of proof. Justice Lesiit held that, *"The burden of proof at the Notice to Show Cause lies with the decree holder at all times. It is the duty and evidential burden of the decree-holder to prove that the judgment debtor has or has had the means to satisfy the decree and further that the judgment debtor has refused or neglected to pay."*

43. As to whether the procedure for arrest and committal should be used as a last resort, Justice M. Ibrahim also commented on the procedure provided in the ***Rules*** in ***Elijah Momanyi p/a Anassi Momanyi and Company Advocates v Bartera*** **Maiyo HC Eldoret Misc. 149 of 2005 (Unreported),** he stated, *"In my view, execution by way of arrest and committal to civil jail must be done the last resort after all other options have been exhausted. The deprival of an individual's liberty is not a matter to be treated lightly or in haste. The protection of the right to liberty in my view is the most sacred of the*

fundamental rights and freedoms of the individual. It should not be taken away easily and particularly in matter relating to commercial transaction and civil litigation. The circumstances justifying such action are equally established and certain facts and conditions must be shown to exist before an order for committal to civil jail is made on the basis of failure to satisfy a property decree. Strictly, committal here is not intended to be punishment but a process through which a debtor can be compelled to pay his debt after all the other usual methods have failed. The execution lacked all due process."

44. An analysis of the provisions of **section 38** of the ***Civil Procedure Act*** and the **Order 22** of the ***Rules*** and their application demonstrates the following:

a) The process of arrest and detention is not arbitrary. The debtor is given an opportunity to show cause before an order is made by a judicial officer.

b) The Judgment-Creditor can only be committed to civil jail once it is demonstrated that he or she has refused or neglected to pay, is about to abscond or is intent on obstructing or delaying execution of the decree.

c) The burden of proof rests on the judgment-creditor to show prove the elements that are necessary for the arrest and committal of the judgment-debtor.

d) That arrest and committal is the last resort after other modes of execution have failed.

e) There is a right of appeal against the decision of ordering arrest and committal.

45. **Order 22 rule 7** is a cause for concern as it empowers the court to issue a warrant of arrest upon an oral application by the judgment creditor when passing the decree if the judgment debtor is within the court prescincts. This provision in my view, does not entitle the judgment debtor to sufficient notice nor opportunity to pay the debt even where he has the means to do so. The rule as worded is an unnecessary infringement on the rights of the judgment-debtor. This renders this particular rule unconstitutional.

46. In my view, the conditions imposed by **section 38** of the ***Civil Procedure Act*** and the ***Rules*** means that the scope of arrest and committal is narrowly tailored for specific debtors who meet the conditions set out in the statute. This position is unlike that obtaining when the case of ***Farieda Coetzee v Republic of South Africa*** **(Supra** at paragraph 14**)** was pronounced. Justice Krieglar found that the Magistrates Court Act was indefensible for several reasons. The rules allowed persons to be imprisoned without having actual notice of either the original judgment or of the hearing. Even if a person has notice of the hearing, he could be imprisoned without knowing of the possible defences available to him and accordingly without any attempt to advance any of them. The rules also cast a burden on the debtor with regard to inability to pay. The court also held that the provisions of Act which spell out what the debtor must prove were unreasonably wide and also unreasonably punitive. For example, the relevant provisions provided, inter alia, that the judgment debtor shall prove to the satisfaction of the court that he is not squandering his money or is apparently living beyond his means or that he has not incurred debts other than for household requirements after the judgment date. The impugned procedure made no provision for recourse by the debtor to the magistrate or higher authority once an order for committal has been made. These provisions differ materially from those contained in the ***Civil Procedure Act*** and ***Rules.***

47. The objective and intendment of the ***Civil Procedure Act*** and the ***Rules*** is to provide the mechanism for the enforcement of judgment debts which is a legitimate and reasonable state objective

and arrest and committal is one of enforcing court judgments. What is to be kept in mind whether the means adopted distinguished those who can pay but are merely refusing to pay those who cannot; a distinction made by Justice G. B. M. Kariuki in ***Rosanna Moi v Philip Moi*** **(Supra)**.

48. The Court must also consider the rights of judgment-creditors. Credit is an important element of the modern economic system and if the mode of enforcement of judgment-debts is unduly onerous, the granting of credit would be imperiled with attendant consequences to society as a whole. As the case of ***Rosanna Moi v Phillip Moi*** **(Supra)** illustrates even cases of maintenance of spouses and children, the use of arrest and committal may be useful against a recalcitrant judgment-debtor.

49. What the Constitution requires is that rights of the judgment debtor be considered and upheld in a manner that is consistent with the values of the Constitution. Save for the provision of **Order 22 rule 7(1)** of the **Civil Procedure Rules** which I find and hold is unconstitutional, I find that the provisions of **section 38** and **40** of the ***Civil Procedure Act*** and **Order 22** rules **32** and **34** of the ***Rules*** are consistent with the Bill of Rights.

<u>Disposition</u>

50. The petitioners', who are judgment debtors, shall be subjected to the provisions of the ***Civil Procedure Act*** and the ***Rules*** and the magistrates dealing with their matters shall act in accordance with established principles.

51. I allow the petition only to the extent that I declare **Order 22 rule 7(1)** of the ***Civil Procedure Rules*** unconstitutional null and void.

52. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 23rd day of July 2012.

D.S. MAJANJA

<u>JUDGE</u>

Mr Onyoro instructed by Muchoki Kangata & Company Advocates for the petitioners.

Ms I. N. Barasa, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Okindo instructed by J.N. Mbuthia and Company Advocates for the 1st interested party.

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